DAVID CHELLIAH

v.

MONORAIL MALAYSIA TECHNOLOGY SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
RICHARD MALANJUM JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: W-02-1068-2004]
3 DECEMBER 2004

CIVIL PROCEDURE: *Interim payment - Application pending trial of action for negligence - Order 22A r. 3(1) Rules of the High Court 1980 - Whether requirements satisfied - Whether applicant should show condition had deteriorated since accident - Whether applicant entitled to substantial damages if claim were to succeed - Whether res ipsa loquitor applied to show negligence*

The appellant was hit on his head by a safety wheel which fell off a monorail train on a test run whilst he was crossing the road. He suffered serious head injuries as a result. The appellant then filed a civil suit against the respondents for their negligence in operating the monorail train and claimed general damages in the sum of RM5,000,000 and special damages. The respondents disputed the claim. Pending the trial of the action, the appellant filed an application for an interim payment of RM250,000 in respect of damages pursuant to O. 22A of the Rules of the High Court 1980 ('RHC'). The learned judge dismissed the appellant's application on the grounds that the appellant did not prove that his condition had deteriorated in the two years since the accident and that should the respondents succeed in their defence of *novus actus interveniens*, the respondents would be absolved from liability altogether or at the very least their share of responsibility would be reduced accordingly. Hence, this appeal by the appellant.

Held (allowing the appeal)
Per Nik Hashim JCA delivering the judgment of the court:

[1] It was not disputed that the respondents had not admitted liability and that the appellant had not obtained judgment against the respondents for damages to be assessed so as to make out a case for interim payment under O. 22A r. 3(1)(a) or (b) RHC. However, on the balance of

probabilities there were sufficient materials to support the appellant's application for an interim payment under O. 22A r. 3(1)(c), *ie*, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents. (p 596 b-d)

[2] The purpose of O. 22A RHC is to provide an interim payment to alleviate a plaintiff's hardship during the period before trial. There was no necessity for the appellant to make out a case that his condition had deteriorated so that an interim payment was needed to meet a worsening medical condition. Order 22A is available to any plaintiff and not limited only to the plaintiff whose condition is deteriorating. (p 597 c-d)

[3] The medical report showed that the appellant had suffered severe brain damage as a result of the accident. Brain damage is generally recognized as giving rise to "substantial damages" or "substantial loss". Further, the appellant was a conscious sufferer who would suffer more than a victim who was brain-dead or comatose. The learned judge erred when he failed to appreciate that the present case fell within the "substantial damages" category and instead confined himself to determining whether there had been deterioration in the appellant's condition since the accident. (p 597 e-f)

[4] The learned judge failed to have regard to the type of accident in which the appellant suffered his injuries. It was a type of accident that clearly called for the respondents to explain how the safety wheel could have dislodged and dropped on to the appellant, a *res ipsa loquitur* situation where in the absence of explanation by the respondents, negligence might be inferred. (p 597 g-h)

[5] The respondents pleaded an act of an unknown 3rd party or parties as responsible for the dislodgement of the safety wheel but there was no averment in this respect. Yet the learned judge concluded that damages would be substantially reduced because of *novus actus interveniens* or 3rd party intervention. In this regard, the learned judge erred in law to so conclude based on the available material that was not as yet tested at that stage. Further, the fact remained that the appellant was an unfortunate victim of negligence. Therefore, there was no basis in law for the learned judge to conclude that in the event the respondents succeeded in their defence of *novus actus interveniens*, the respondents would be absolved from liability altogether or that damages would be substantially reduced. (p 598 a-b, d)

[6] The circumstances of the case, the available evidence and current authorities on comparable damages enabled the appellant to recover substantial damages exceeding RM50,000 if the matter proceeded to trial. However, the appellant's claim for RM250,000 for an interim payment under O. 22A RHC was rather excessive. A sum of RM50,000 was more reasonable. (p 598 e-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dipukul oleh suatu roda keselamatan yang terjatuh dari sebuah keretapi monorel yang melalui ujian perjalanan semasa dia melintas sebuah jalan. Dia mengalami kecederaan kepala yang serius akibat pukulan itu. Perayu kemudian memfailkan suatu guaman sivil terhadap responden-responden akibat kecuaian mereka dalam menjalankan keretapi monorel tersebut dan menuntut ganti rugi umum sebanyak RM5,000,000 dan ganti rugi khas. Responden-responden membantah tuntutan tersebut. Sambil menunggu perbicaraan, perayu memfailkan permohonan untuk pembayaran interim sebanyak RM250,000 berhubung ganti rugi mengikut A. 22A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Hakim arif menolak permohonan perayu atas alasan bahawa perayu tidak membuktikan bahawa keadaannya telah merosot dalam masa dua tahun kemalangan tersebut dan bahawa jika responden-responden berjaya dalam pembelaan *novus actus interviens*, responden-responden akan dilepaskan dari liabiliti langsung atau sekurang-kurangnya bahagian liabiliti mereka akan dikurangkan sewajarnya. Maka rayuan perayu ini.

Diputuskan (membenarkan rayuan)
Oleh Nik Hashim HMR menyampaikan penghakiman mahkamah:

[1] Tidak dipertikaikan bahawa responden-responden tidak mengaku liabiliti dan bahawa perayu tidak mendapat penghakiman terhadap responden-responden untuk tafsiran ganti rugi supaya berhak untuk kes pembayaran interim di bawah A. 22A k. 3(1)(a) atau (b) KMT. Tetapi atas imbangan kebarangkalian terdapat bahan-bahan mencukupi untuk menyokong permohonan perayu untuk pembayaran interim di bawah A. 22A k. 3(1)(c), iaitu, jika tindakan diteruskan untuk perbicaraan, perayu akan mendapat penghakiman untuk ganti rugi yang substantif terhadap responden-responden.

[2] Tujuan A. 22A KMT adalah untuk memberi pembayaran interim bagi meringankan kesukaran seseorang plaintif dalam masa sebelum perbicaraan. Tiada keperluan untuk perayu membuat suatu kes bahawa keadaannya telah merosot untuk menunjukkan pembayaran interim diperlukan bagi suatu keadaan perubatan yang bertambah buruk.

[3] Laporan perubatan menunjukkan bahawa perayu menderita kerosakan otak yang teruk akibat kemalangan itu. Kerosakan otak secara umumnya diakui sebagai membangkitkan kerosakan yang substantif atau kerugian yang substantif. Lagipun, perayu adalah penderita yang tersedar penderitaannya dan akan menderita lebih daripada seorang mangsa yang mati otak atau dalam keadaan koma. Hakim arif terkhilaf apabila beliau gagal menilai bahawa kes semasa termasuk dalam lingkungan kategori ganti rugi substantif dan sebaliknya menghadkan kes kepada menentukan sama ada terdapat kerosakan dalam kesihatan perayu semenjak kemalangan itu.

[4] Hakim arif gagal memberi perhatian kepada jenis kemalangan di mana perayu mengalami kecederaannya. Ia adalah jenis kemalangan yang jelasnya memerlukan responden-responden untuk menerangkan macam mana roda keselamatan terlepas dan terjatuh ke atas perayu, keadaan *res ipsa loquitor* di mana dalam ketiadaan penjelasan daripada responden-responden, kecuaian boleh disimpulkan.

[5] Responden-responden merayu bahawa tindakan seorang party ketiga yang tidak dikenali atau parti-parti lain bertanggungjawab untuk roda keselamatan tersebut terlepas tetapi tiada penegasan mengenai hal ini. Meskipun demikian, hakim arif menyimpulkan bahawa ganti rugi akan dikurangkan dengan banyaknya disebabkan *novus actus interveniens* atau pencelahan parti ketiga. Dalam perkara ini, hakim arif tersilap menyimpul sedemikian berasaskan bahan-bahan yang tersedia yang tidak diuji pada tahap itu. Lagipun, fakta menunjukkan bahawa perayu memang mangsa malang akibat kecuaian. Dengan itu, tiada alasan dari segi undang-undang bagi hakim arif untuk menyimpul bahawa jika responden-responden berjaya dalam pembelaan *novus actus interveniens*, responden-responden akan dilepaskan daripada liabiliti secara langsung atau ganti rugi akan dikurangkan dengan banyaknya.

[6] Keadaan kes semasa, keterangan yang tersedia dan autoriti-autoriti semasa atas perbandingan ganti rugi membolehkan perayu mendapat kembali ganti rugi melebihi RM50,000 jika kes diteruskan untuk perbicaraan. Tetapi, tuntutan perayu untuk RM250,000 bagi pembayaran interim di bawah A. 22A KMT terlalu banyak. Jumlah sebanyak RM50,000 lebih munasabah.

Case(s) referred to:
Barkway v. South Wales Transport Co Ltd [1950] 1 All ER 392 ***(refd)***
Dr Yusuff Hj Mansur v. Changkat Jering Sdn Bhd & Anor [1997] 3 CLJ Supp 211 HC ***(refd)***
H West & Son Ltd v. Shephard [1954] AC 326 ***(refd)***
Jamil Harun v. Yang Kamsiah [1984] 1 CLJ 215; [1984] 1 CLJ 11 PC ***(refd)***
Lim Poh Choo v. Camden Health Authority [1979] 2 All ER 910 ***(refd)***
Mediahouse Sdn Bhd v. Koh Kim Suan [1998] 3 AMR 2338 ***(refd)***
Ricci Burns Ltd v. Toole & Anor [1989] 3 All ER 478 ***(refd)***
Schott Kem Ltd v. Bentley & Ors [1990] 3 All ER 850 ***(refd)***
Shearson Lehman Bros Inc v. Maclaine Watson & Co Ltd [1987] 2 All ER 181 ***(refd)***
Stringman v. McArdle [1994] 1 WLR 1653 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 22A rr. 1, 3(1)(a), (b)

Rules of the Supreme Court, O. 29 rr. 9, 11, 12

Other source(s) referred to:
Civil Procedure Rules, p 513
Halsbury Laws of Malaysia, vol 1, p 552

For the appellant - Cyrus Das (Steven Thiru); M/s Shook Lin & Bok
For the respondents - Tunku Farik Ismail (T Tharumarajah); M/s Azim Tunku Farik & Wong

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 21-72-2003]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim JCA:

Background

At about 5.20pm on 16 August 2002, the appellant, a 40 year old senior journalist with Bernama, was hit on his head by a 13.4kg safety wheel which fell off of a monorail train on a test run whilst he was crossing the road at Jalan Sultan Ismail, Kuala Lumpur. He suffered serious head injuries as a result.

As a result of those injuries he suffered, the appellant filed a civil suit against the respondents for their negligence in operating the monorail train. In the statement of claim, the appellant claimed general damages in the sum of RM5,000,000 and special damages. In their defence, the respondents disputed the claim and alleged that the injuries suffered by the appellant were caused wholly or partly due to his own negligence.

Pending the trial of his action, the appellant filed an application for an interim payment of RM250,000 in respect of damages pursuant to O. 22A of the Rules of High Court 1980 (the RHC).

On 20 September 2004, the learned High Court judge dismissed the appellant's application essentially on two grounds:

(i) the appellant had not proven that his condition had deteriorated in the two years since the accident; and

(ii) the learned judge had found that should the respondents succeed in their defence of 'novus actus interveniens' (that the safety wheel came off as a result of deliberate intervention by person or persons unknown or as yet unidentified), the respondents would be absolved from liability altogether or at the very least their share of responsibility would be reduced accordingly and thus, the appellant would not be able to obtain substantial damages if the matter proceeded to trial.

Dissatisfied by the said decision, the appellant now appealed to this court.

On 23 November 2004, we allowed the appeal with costs here and below and made an order that an interim payment of RM50,000 be awarded in favour of the appellant. We also made an order that the deposit be refunded to the appellant.

Order 22A Of The RHC

Order 22A was introduced in the RHC by the Rules of the High Court (Amendment) (No 2) 1993 *vide* PU(A) 192/93 with effect from 1 August 1993. It followed the view expressed by Lord Scarman in *Jamil bin Harun v. Yang Kamsiah* [1984] 1 CLJ 215; [1984] 1 CLJ (Rep) 11 that Malaysia had no provision similar to O. 29 rr. 9, 11 & 12 of the English RSC. In that case one of the plaintiffs was a seven year old infant from a lower income background who suffered severe brain injuries as a result of an accident (liability was admitted by the defendant), required medical and lifelong nursing care and supervision. The matter went on appeal to the Privy Council on the assessment of damages. His Lordship, in delivering the judgment of the Board at p. 221 said:

> Their Lordships cannot leave this case without commenting on two unsatisfactory features … as their Lordships understand the position, no power exists in a case where the liability is admitted for an interim payment to be ordered pending a final decision on quantum of damages … it would seem legislation may be needed to enable an interim award to be made. (see *Malaysian High Court Practice* – 2001 Desk Edition 1 – p 770-790).

Order 22A r. 1 provides as follows:

> 'interim payment', in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff …

Thus, under this rule the court may, on an application by the plaintiff, order interim payment be made pending the outcome of the civil suit.

In the present appeal for the appellant to succeed, the appellant has to satisfy the court the requirements laid down under O. 22A r. 3(1) of the RHC which states:

(a) that the defendants (respondents) have admitted liability for the appellant's damages; or

(b) that the appellant has obtained judgment against the respondents for damages to be assessed; or

(c) that, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents.

Order 22A r. 3(1) of the RHC also provides that should the appellant be able to satisfy the court of any one of the requirements mentioned above, the court, may, if it thinks fit order the respondents to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the appellant after taking into account of any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondents may be entitled to rely.

The standard of proof required in an application for interim payment is on the balance of probabilities and not beyond reasonable doubt (see *Mediahouse Sdn Bhd v. Koh Kim Suan* [1998] 3 AMR 2338 which followed *Ricci Burns Ltd v. Toole & Anor* [1989] 3 All ER 478).

English case law and commentary make it clear that the underlying purpose of O. 22A is to provide for an interim payment to alleviate a plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial: see *Shearson Lehman Bros Inc v. Maclaine Watson & Co Ltd* [1987] 2 All ER 181 at p 190 where the English Court of Appeal also observed that when construing the rule, the court should be slow to adopt a construction that would defeat the evident purpose of the rule. (see also *Halsbury Laws of Malaysia*, vol 1 at p 552; *Civil Procedure Rules* (UK) p 513). Further, there is no necessity for the plaintiff to show

that he would suffer prejudice if he did not obtain an interim payment (*Schott Kem Ltd v. Bentley & Ors* [1990] 3 All ER 850); neither must he show that a particular sum is required to cover a need (*Stringman v. McArdle* [1994] 1 WLR 1653). In awarding an interim payment, the court is not concerned with how the money is to be spent (*Stringman*, supra).

The Findings

It is not disputed that in the present appeal the respondents have not admitted liability. In paras. 5 and 6 of their statement of defence, the respondents categorically denied liability and put the appellant to strict proof thereof. It is also noted that the appellant has not obtained judgment against the respondents for damages to be assessed. Therefore, in our view, the appellant could not make a case for an interim payment against the respondents under O. 22A r. 3(1)(a) or (b).

However, on the balance of probability, we were satisfied that there were sufficient materials to support the appellant's application for an interim payment under O. 22A r. 3(1)(c) that is, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents.

In the instant case, the appellant was crossing the road at Jalan Sultan Ismail on the fateful day when the safety wheel of a monorail train traveling overhead fell off and landed on his head. The appellant felt unconscious and suffered severe brain damage described in the KLGH medical report at p 367 of the record of appeal as "very serious injury":

> … his injuries were in no way mild. This was a very serious injury. The nature of the impact was such that he could have died immediately as a result of head or spinal injuries. The brain hematoma was an immediate threat to his life and therefore had to be removed. We saw eight fracture fragments at craniotomy …
>
> Direct brain injury caused his left hand weakness and this could be permanent. The bifrontal contusions seen on the CT and the extruding brain seen in this area further attest to the serious trauma delivered to this part of his brain. This can result in serious cognitive impairment and expose him to the risk of seizures which may sometimes manifest years later.
>
> The fractures through the base of his skull put him at risk of developing years later. This can lead to meningitis or the development of brain abcesses. Mr. Kovilpillai Chelliah David has survived a very serious injury.

sd.

Mr. Ravi Krishnapillai
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Jabatan Bedah Otak & Saraf
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In refusing the appellant's application, the learned judge was of the view that the appellant would not obtain judgment for substantial damages at trial later because the appellant had not proven that his condition had deteriorated in the two years since the accident. With respect, we did not agree with the learned judge. We agreed with the learned counsel for the appellant that the learned judge misunderstood the purpose of O. 22A and its application. As adverted to earlier, the purpose of O. 22A is to provide an interim payment to alleviate a plaintiff's hardship during the period before trial. There was no necessity for the appellant to make out a case that his condition had deteriorated so that an interim payment was needed to meet a worsening medical condition. It is worthy of note that O. 22A is available to any plaintiff and not limited only to plaintiff whose condition is deteriorating.

In our view, the statement of claim shows that if the appellant succeeds in his claim, he would be entitled to substantial damages. The medical report shows that the appellant had suffered severe brain damage as a result of the accident. Brain damage is generally recognized as giving rise to "substantial damages" (see Lord Pearce in *H.West & Son Ltd v. Shephard* [1954] AC 326 at 365) or "substantial loss" (see Lord Scarman in *Lim Poh Choo v. Camden Health Authority* [1979] 2 All ER 910 at 919). Further, the appellant is a "conscious sufferer" who would suffer more than a victim who is brain-dead or comatose (see *Dr Yusuff bin Hj Mansur v. Changkat Jering Sdn Bhd & Anor* [1997] 3 CLJ Supp 211). In our view, the learned judge was in error when he failed to properly appreciate that the present case falls within the "substantial damages" category and instead confined himself to determining whether there has been deterioration in the appellant's condition since the accident.

On the question of liability, obviously the High Court failed to have regard to the type of accident in which the appellant suffered his injuries. It was a type of accident which clearly called for the respondents to explain how the safety wheel could have dislodged and dropped on the appellant, a *res ipsa loquitur* situation – where in the absence of explanation by the respondents, negligence may be inferred (see *Barkway v. South Wales Transport Co. Ltd* [1950] 1 All ER 392 HL).

In this appeal, the respondents pleaded an act of an unknown 3rd party or parties as responsible for the dislodgment of the safety wheel but there is no averment in respect of this 3rd party intervention. Yet the learned judge seemed to have concluded on this point alone that damages would be substantially reduced because of 'novus actus interveniens' or 3rd party intervention. In this regard, we agreed with the appellant that the learned judge was not entitled and therefore erred in law to so conclude based on the available material which was not as yet tested at that stage.

Further, it must be noted that the 4th defendant, the Railway Director General, in his statement of defence (see paras. 21(a) to (d) at pp. 94 to 95 of the appeal of record) has alleged that the present respondents (1st and 2nd respondents) were negligent in operating the monorail train without ensuring that the safety wheel was duly fastened or ensuring proper security measures were taken to prevent 3rd party tampering. At this stage, though the 4th defendant was blaming the respondents or 3rd party for the negligence, the fact remains that the appellant was an unfortunate victim of the negligence. Thus, there was no basis in law for the learned judge to conclude that in the event the respondents succeeded in their defence of 'novus actus interveniens', the respondents would be absolved from liability altogether or that damages would be substantially reduced.

The basis of the appellant's claim for RM250,000 interim payment was that he would recover substantial damages at the trial of his action for negligence. The respondents, however, contended that any award to compensate the appellant if he succeeded at the trial, would not exceed a sum in the region of RM50,000 to RM60,000 based on the current trend of authorities. For that reason the respondents suggested an interim payment of RM20,000 to be a fair figure. In our view, the sum offered was too low. Therefore, in the circumstances of this case and based on the available evidence and the current authorities on comparable damages, we are of the opinion that the appellant would be able to recover substantial damages exceeding RM50,000 if the matter proceeded to trial. However, in this case, the appellant's claim for RM250,000 for an interim payment under O. 22A was rather excessive. A sum of RM50,000 would be more reasonable. In the exercise of our discretion, we made the orders accordingly.